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ORIGIN OPIC-06

INFO OCT-01 ARA-06 ISO-00 EB-07 L-03 AID-05 CIAE-00

COME-00 FRB-03 INR-07 NSAE-00 USIA-06 TRSE-00 XMB-02

SP-02 CIEP-01 LAB-04 SIL-01 OMB-01 STR-04 NSC-05

SS-15 CEA-01 /080 R

DRAFTED BY OPIC/GC:LLUCERO
APPROVED BY EB/IFD/OIA:RJSMITH
OPIC/GC:CHUNT
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R 032051Z NOV 75
FM SECSTATE WASHDC
TO AMEMBASSY SAN SALVADOR

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E.O. 11652:N/A

TAGS:EFIN

SUBJECT: OPIC BILATERAL

REF: SAN SALVADOR 2833

1. OPIC HAS REVIEWED "UNOFFICIAL" COUNTERDRAFT OF FOREIGN
MINISTRY TO PROPOSED OPIC BILATERAL.

2. FOLLOWING ARE OPIC CHANGES TO ENGLISH TRANSLATION OF
COUNTERDRAFT. CHANGES ARE IN PARENTHESIS.

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(A) ART. 5. FIRST AND SECOND SENTENCE HAVE BEEN AMENDED TO READ AS FOLLOWS:

"ANY DISPUTE BETWEEN THE TWO GOVERNMENTS REGARDING THIS INTERPRETATION OR APPLICATION OF THE PROVISIONS OF THIS AGREEMENT (OR INVOLVING A QUESTION OF PUBLIC INTERNATIONAL LAW RELATED TO EVENTS CAUSING PAYMENT UNDER AN INVESTMENT GUARANTY), SHALL BE THE SUBJECT OF NEGOTIATIONS BETWEEN THE TWO GOVERNMENTS AND IN SO FAR AS POSSIBLE SHALL BE CLARIFIED OR SETTLED IN THOSE NEGOTIATIONS. IF, WITHIN A PERIOD OF THREE MONTHS AFTER A REQUEST BY EITHER OF THE GOVERNMENTS FOR SUCH INTERPRETATION, THE TWO GOVERNMENTS ARE UNABLE TO AGREE ON A SETTLEMENT OF SUCH DISPUTE, THE MATTERS, (INCLUDING THE QUESTION OF WHETHER SUCH DISPUTE PRESENTS A

QUESTION OF PUBLIC INTERNATIONAL LAW), SHALL BE REFERRED UPON THE INITIATIVE OF EITHER GOVERNMENT, TO A SOLE ARBITRATOR SELECTED BY MUTUAL AGREEMENT, FOR FINAL AND BINDING SETTLEMENT ACCORDING TO THE APPLICABLE PRINCIPLES OF INTERNATIONAL LAW ..."

ARTICLE 5 WOULD THUS NOW PROVIDE THAT DISPUTES BETWEEN THE GOVERNMENTS INVOLVING QUESTIONS OF PUBLIC INTERNATIONAL LAW RELATED TO EVENTS CAUSING PAYMENT UNDER AN INVESTMENT GUARANTY WOULD ALSO BE THE SUBJECT OF NEGOTIATION AND POSSIBLE BINDING ARBITRATION. THIS CHANGE APPLIES ONLY TO DISPUTES RELATED TO EVENTS CAUSING PAYMENT UNDER AN INVESTMENT GUARANTY INVOLVING QUESTIONS OF PUBLIC INTERNATIONAL LAW.

THE CHANGE IN THE SECOND SENTENCE WOULD ALLOW THE REFERRAL TO ARBITRATION OF QUESTIONS RELATING TO WHETHER DISPUTES PRESENT QUESTIONS OF PUBLIC INTERNATIONAL LAW. THIS PROVISION IS NECESSARY SINCE THERE MAY BE DISAGREEMENT BETWEEN THE TWO GOVERNMENTS AS TO WHETHER A DISPUTE ARISING FROM EVENTS CAUSING PAYMENT UNDER AN INVESTMENT GUARANTY INVOLVES A QUESTION OF PUBLIC INTERNATIONAL LAW.

(B) ART. 6 HAS BEEN ELIMINATED. THIS ARTICLE AS PRESENTLY WORDED IS NOT ACCEPTABLE SINCE ITS BROAD LANGUAGE WOULD LIMITED OFFICIAL USE

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SUBJECT ALL INTERGOVERNMENTAL CLAIMS TO "PROCEDURE ESTABLISHED BY THE LAWS OF EL SALVADOR." THE POINT TO BE MADE IS THAT WITH RESPECT TO SUBROGATION CLAIMS DERIVED FROM THE PRIVATE LAW RIGHTS OF THE INSURED INVESTOR THE AGREEMENT DOES NOT PREVENT THE EXERCISE OF EL SALVADORAN JURISDICTION. A DISPUTE PRESENTING A QUESTION OF PUBLIC INTERNATIONAL LAW COULD ARISE EITHER AS A RESULT OF A DENIAL OF JUSTICE WITH RESPECT TO SUCH A SUBROGATION CLAIM,

OR WITH RESPECT TO A STRICTLY INTERGOVERNMENTAL MATTER (E. G. INTERPRETATION OF THE AGREEMENT) TO WHICH THE JURISDICTION AND COMPETENCE OF LOCAL COURTS WOULD NOT EXTEND. ALL OF THIS IS IMPLICIT IN LIMITATION OF DISPUTES CLAUSE TO THOSE PRESENTING QUESTIONS OF INTERNATIONAL LAW. FOR CLARITY, THE FOLLOWING SENTENCE SHOULD BE INSERTED AT THE BEGINNING OF ARTICLE 5.

ARTICLE 5. (NOTHING IN THIS AGREEMENT SHALL REMOVE FROM THE JURISDICTION AND COMPETENCE OF EL SALVADOR DISPUTES ARISING FROM AN INVESTMENT OR PROJECT FOR WHICH AN INVESTMENT GUARANTY HAS BEEN ISSUED OR FROM PAYMENT MADE UNDER AN INVESTMENT GUARANTY; PROVIDED HOWEVER THAT) ANY DISPUTE BETWEEN THE TWO GOVERNMENTS ..."

(C) ARTICLE 7 STATING CONDITIONS REGARDING SUBROGATION HAS BEEN MOVED TO IMMEDIATELY FOLLOW AND BECOME PART OF ARTICLE 3, THE BASIC SUBROGATION CLAUSE. ARTICLE 3 HAS BEEN AMENDED TO READ AS FOLLOWS:

"ARTICLE 3. IF, PURSUANT TO AN INVESTMENT GUARANTY, AN INVESTOR TRANSFERS TO THE GOVERNMENT OF THE UNITED STATES OF AMERICA:

(I) LEGAL CURRENCY OF EL SALVADOR, INCLUDING CREDITS IN SUCH CURRENCY;

(II) ANY CLAIMS OR RIGHTS WHICH THE INVESTOR HAS OR MAY HAVE, RESULTING FROM HIS INVESTMENT IN EL SALVADOR; AND

(III) ALL OR PART OF THE INTEREST OF THE INVESTOR IN ANY PROPERTY (PERSONAL OR REAL, TANGIBLE OR INTANGIBLE) SITUATED IN EL SALVADOR.

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RECOGNITION OF (THESE) SUBROGATIONS SHALL (TAKE EFFECT) AND BE (VALID) SUBJECT TO THE FOLLOWING CONDITIONS:

(A) NONE OF THE PROVISIONS OF THIS AGREEMENT SHALL GIVE THE GOVERNMENT OF THE UNITED STATES OF AMERICA OTHER RIGHTS THAN THOSE HELD BY THE INVESTOR WITH RESPECT TO ANY PETITIONS, CLAIMS, OR RIGHTS TO WHICH THE GOVERNMENT OF THE UNITED STATES HAS BEEN SUBROGATED. (NOTHING IN THIS AGREEMENT SHALL BE DEEMED TO ABRIDGE THE RIGHT OF THE GOVERNMENT OF THE UNITED STATES TO ASSERT A CLAIM IN ITS SOVEREIGN CAPACITY UNDER INTERNATIONAL LAW).

(B) (THE GOVERNMENT OF EL SALVADOR WILL RECOGNIZE SUCH TRANSFERS AS VALID IF IT CONFORMS TO THE CONSTITUTION AND THE LAWS OF EL SALVADOR. TO THE EXTENT THAT THE LAWS OF

EL SALVADOR PARTIALLY OR WHOLLY INVALIDATE OR PROHIBIT THE ACQUISITION FROM A COVERED INVESTOR OF ANY INTERESTS IN ANY PROPERTY WITHIN ITS TERRITORY BY THE GOVERNMENT OF THE UNITED STATES, THE GOVERNMENT OF EL SALVADOR SHALL PERMIT SUCH INVESTOR AND THE GOVERNMENT OF THE UNITED STATES TO MAKE APPROPRIATE ARRANGEMENTS PURSUANT TO WHICH SUCH INTERESTS ARE TRANSFERRED TO AN ENTITY PERMITTED TO OWN SUCH INTERESTS UNDER THE LAWS OF THE GOVERNMENT OF EL SALVADOR.)"

THE LAST SENTENCE OF FORMER ARTICLE 3 HAS BEEN DELETED SINCE THIS PROVISION IS ALREADY INCLUDED IN THE NEW ARTICLE 3(A).

THE PROVISION INSERTED AS THE LAST SENTENCE IN ARTICLE 3(A) IS THE STANDARD CLAUSE USED IN THE TYPICAL OPIC BILATERAL RESERVING THE RIGHT OF THE U.S. TO ASSERT CLAIMS UNDER INTERNATIONAL LAW IN ITS SOVEREIGN CAPACITY.

ARTICLES 3(B) AND 3(C) (FORMERLY ARTICLES 7(B) AND 7(C)) HAVE BEEN DELETED IN THEIR ENTIRETY BECAUSE OF THE REFERENCE TO "COMPENSATION" AND "FAIR VALUE" WITH REGARD TO THE INVESTOR'S PROPERTIES, WHICH COULD RESULT IN SOME CONFUSION AND DIFFICULTY IN DETERMINING THE AMOUNT OF COMPENSATION DUE OPIC AS SUBROGEE OF THE INVESTOR'S INTEREST IN THE INVESTMENT OR PROJECT. THE CONCERN IS LIMITED OFFICIAL USE

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THAT ONCE SUCH REFERENCE TO COMPENSATION IS MADE, IT SHOULD BE DEFINED IN TERMS OF INTERNATIONALLY ACCEPTED STANDARDS. HOWEVER, REFERENCE TO SUCH INTERNATIONAL STANDARDS OF COMPENSATION HAS NOT BEEN MADE TO DATE IN OPIC BILATERALS. THUS, THESE ARTICLES HAVE BEEN REPLACED BY THE STANDARD PROVISION USED IN THE TYPICAL OPIC BILATERAL.

FOR PURPOSES OF CLARITY AND CONTINUITY, THE NEXT TO THE LAST SENTENCE OF FORMER ARTICLE 3 HAS BEEN MOVED TO AND IS NOW THE FIRST SENTENCE OF ARTICLE 3(B).

(D) ART. 8. THIS ARTICLE HAS BEEN RENUMBERED AS ARTICLE 6. THE SECOND PARAGRAPH HAS BEEN AMENDED TO EXTEND THE PERIOD DURING WHICH THE AGREEMENT SHALL CONTINUE IN FORCE AFTER ITS TERMINATION BY EITHER PARTY FROM NINETY DAYS TO SIX MONTHS.

THE SECOND SENTENCE OF THE THIRD AND LAST PARAGRAPH HAS BEEN AMENDED TO READ AS FOLLOWS:

"WHEN THIS AGREEMENT ENTERS INTO FORCE, IT SHALL REPLACE

AND TERMINATE THE AGREEMENT ON PRIVATE INVESTMENT GUARANTIES SIGNED BETWEEN THE TWO GOVERNMENTS AT SAN SALVADOR ON JANUARY 29, 1960, AND FROM THAT DATE FORWARD THE PROVISIONS OF THIS AGREEMENT SHALL APPLY TO INVESTMENT GUARANTIES ISSUED BY THE GOVERNMENT OF THE UNITED STATES OF AMERICA (UNDER THE AFOREMENTIONED AGREEMENT)."

PROVISIONS OF THIS AGREEMENT SHALL APPLY TO INVESTMENT GUARANTIES ISSUED UNDER THE 1960 AGREEMENT UPON ITS TERMINATION.

3. FULL TEXT OF ENGLISH VERSION OF FOREIGN MINISTRY COUNTERDRAFT AS MODIFIED BY OPIC BEING AIR POUCHED THIS DATE.

4. SINCE SUBSTANTIAL CHANGES HAVE BEEN MADE TO BOTH THE FOREIGN MINISTRY COUNTERDRAFT AND THE ORIGINAL OPIC PROPOSED BILATERAL, IT MAY BE ADVISABLE AND APPROPRIATE FOR OPIC COUNSEL TO PRESENT AND ELABORATE FURTHER ON THESE LIMITED OFFICIAL USE

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CHANGES TO THE APPROPRIATE EL SALVADORAN OFFICIALS. THIS SHOULD BE DONE PRIOR TO MID-NOVEMBER OPIC INVESTMENT MISSION VISIT TO EL SALVADOR. RECOMMEND EMBASSY GIVE TEXT TO GOES WITH COMMENTS PROVIDED HEREIN AND INDICATE OPIC WILLINGNESS TO TRY TO SCHEDULE EARLY VISIT BY COUNSEL.

5. OPIC WOULD APPRECIATE EMBASSY ADVICE ON PARAGRAPH 4 ABOVE. KISSINGER

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Message Attributes

Automatic Decaptioning: X
Capture Date: 01 JAN 1994
Channel Indicators: n/a
Current Classification: UNCLASSIFIED
Concepts: AGREEMENTS, AGREEMENT DRAFT, TEXT, INVESTMENT CONTROLS, NEGOTIATIONS, AMENDMENTS
Control Number: n/a
Copy: SINGLE
Draft Date: 03 NOV 1975
Decaption Date: 01 JAN 1960
Decaption Note:
Disposition Action: RELEASED
Disposition Approved on Date:
Disposition Authority: GolinoFR
Disposition Case Number: n/a
Disposition Comment: 25 YEAR REVIEW
Disposition Date: 28 MAY 2004
Disposition Event:
Disposition History: n/a
Disposition Reason:
Disposition Remarks:
Document Number: 1975STATE259889
Document Source: CORE
Document Unique ID: 00
Drafter: LLUCERO
Enclosure: n/a
Executive Order: N/A
Errors: N/A
Film Number: D750381-1033
From: STATE
Handling Restrictions: n/a
Image Path:
ISecure: 1
Legacy Key: link1975/newtext/t19751183/aaaacwpcf.tel
Line Count: 256
Locator: TEXT ON-LINE, ON MICROFILM
Office: ORIGIN OPIC
Original Classification: LIMITED OFFICIAL USE
Original Handling Restrictions: n/a
Original Previous Classification: n/a
Original Previous Handling Restrictions: n/a
Page Count: 5
Previous Channel Indicators: n/a
Previous Classification: LIMITED OFFICIAL USE
Previous Handling Restrictions: n/a
Reference: 75 SAN SALVADOR 2833
Review Action: RELEASED, APPROVED
Review Authority: GolinoFR
Review Comment: n/a
Review Content Flags:
Review Date: 09 SEP 2003
Review Event:
Review Exemptions: n/a
Review History: RELEASED <09 SEP 2003 by ellisoob>; APPROVED <12 NOV 2003 by GolinoFR>
Review Markings:

Margaret P. Grafeld
Declassified/Released
US Department of State
EO Systematic Review
06 JUL 2006

Review Media Identifier:
Review Referrals: n/a
Review Release Date: n/a
Review Release Event: n/a
Review Transfer Date:
Review Withdrawn Fields: n/a
Secure: OPEN
Status: NATIVE
Subject: OPIC BILATERAL
TAGS: EFIN, OPIC
To: SAN SALVADOR
Type: TE
Markings: Margaret P. Grafeld Declassified/Released US Department of State EO Systematic Review 06 JUL 2006